UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

[illegible], Appellant, v. UNITED STATES OF AMERICA, Respondent.	No. [illegible]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
[illegible] DIVISION

APPELLANT'S OPENING BRIEF

[illegible]
ATTORNEY FOR APPELLANT
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TELE: [illegible] Area Code [illegible]

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UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

WILLIAM EDWARD ROSE, Appellant, v. UNITED STATES OF AMERICA Respondent,	No. 36910-SD (C)

Appeal From the United States District Court
For the Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant guilty of one count of a one-count indictment charging a violation of Title 18, United States Code, Section 1407, to-wit: Failure of a narcotic user to register. References to the Reporter's Transcript will hereinafter be designated R.T., references to the Clerk's Transcript will hereinafter be designated C.T., and reference to the Amended Clerk's Transcript will hereinafter be designated as A.C.T.

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

WILLIAM EDWARD MOORE, Appellant,	No. 20758-PH (CD
v.	
UNITED STATES OF AMERICA Respondent.	

Appeal From the United States District Court
For the Southern District of California
Northern Division

APPELLANT'S OPENING BRIEF

I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant guilty of one count of a two-count indictment charging a violation of Title 18, United States Code, Section 1407, in that: Failure of a registrant under to register. References to the Reporter's Transcript will hereinafter be designated R.T., references to the Clerk's Transcript will hereinafter be designated as C.T., and reference to the Amended Clerk's Transcript will hereinafter be designated as A-C.T.

Appellant was convicted following a waiver of jury trial and stipulation as to the facts, of the single count indictment(R.T., p. 6). On September 8, 1966, judgment was entered (C.T., p. 16). A timely notice of appeal was filed four days later, on September 12, 1966 (C.T., p. 17).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, U.S.C., Sections 1291 and 1294, and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against appellant by the Grand Jury for the United States District Court, Southern District of California, Southern Division, which indictment was filed on July 6, 1966 (C.T., p. 3). The indictment was in one count and charged in essence that on or about May 29, 1966, appellant, being a citizen of the United States who was then "addicted to and a user of" narcotic drugs, returned to and entered the United States at the Port of San Diego (San Ysidro), San Diego County, without registering with a Customs official, and without surrendering the certificate required by law in violation of Title 18, U.S.C., Section 1407.

Appellant was thereafter arraigned and subsequently

Appellant was convicted following a waiver of jury trial and stipulation as to the facts, of the single count indictment (C.T., p. 8). On September 8, 1966, judgment was entered (C.T., p. 15). A timely notice of appeal was filed four days later, on September 12, 1966 (C.T., p. 17).

The District Court had jurisdiction pursuant to the provisions of Title 18, U.S.C., Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, U.S.C., Sections 1291 and 1294, and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

12.

STATEMENT OF THE CASE

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Appellant was thereafter arraigned and subsequently

filed a Motion to Dismiss the Indictment and a Motion to Strike portions of the indictment (C.T., p.4, 5), said Motions being predicated on the ground that the indictment charged an offense which violates the Constitution of the United States in that said indictment and the statute it was predicated upon contravened the Due Process provision of the Fifth Amendment to the Constitution; the prohibition against self-incrimination contained in the Fifth Amendment to the Constitution; and the Eighth Amendment prohibition against cruel and unusual punishment. Said motion also requested the court to strike from the indictment that portion which alleged that at the time of the commission of the offense, defendant was "a user of" narcotic drugs, on the ground that this phrase is vague and ambiguous and violative of the Due Process provision of the Fifth Amendment to the Constitution. A hearing was had on said motion, at the conclusion of which hearing the said motion was denied and the plea of not guilty was entered on behalf of appellant (A.C.T. p.2).

On August 16, 1966, jury trial was waived and the case was tried on stipulated facts (R.T., p.5, 6; C.T., p.14, 15), counsel for appellant moved for a dismissal of the indictment and striking a portion of the indictment which was denied, and the verdict was returned against the appellant (R.T., p.6).

On September 8, 1966, the appellant was adjudged

filed a motion to dismiss the indictment and a motion to
strike portions of the indictment (C.T., p.4, 5), said
motions being predicated on the ground that the indictment
charged an offense which violates the immunization of the
United States in that said indictment and the statute it
was predicated upon contravened the Due Process provision
of the Fifth Amendment to the Constitution; the prohibition
against self-incrimination contained in the Fifth Amendment
to the Constitution; and the Eighth Amendment prohibition
against cruel and unusual punishment. Said motion also
requested the court to strike from the indictment that par-
tion which alleged that at the time of the commission of the
offense, defendant was "a user of" narcotic drugs, on the
ground that this phrase is vague and ambiguous and violative
of the Due Process provision of the Fifth Amendment to the
Constitution. A hearing was had on said motion, at the
conclusion of which hearing the said motion was denied and
the plea of not guilty was entered on behalf of appellant
(A.C.T. p.7).

On August 19, 1960, jury trial was waived and the
cause was tried on stipulated facts (R.T., p.5, 8; C.T.,
p.14, 15), counsel for appellant moved for a dismissal of
the indictment and striking a portion of said indictment
which was denied, and the verdict was returned against the
appellant (R.T., p.8).

On September 8, 1960, the appellant was adjudged

to be a young adult offender pursuant to the provisions of Section 5010 (a) of Title 18, U.S.C., and placed on probation (C.T., p.16).

III.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to strike from the indictment the portion thereof alleging that defendant-appellant was a "user" of narcotics.

2. The District Court erred in failing to dismiss the indictment.

3. The statute under which defendant-appellant was indicted, tried and sentenced, to-wit: Title 18, U.S.C., Section 1407, is unconstitutional in whole or in part when applied to appellant.

IV

STATEMENT OF FACTS

An indictment was filed on July 6, 1966, in the United States District Court, Southern District of California, Southern Division, charging appellant of being a citizen of the United States who was, on May 29, 1966, "addicted to and a user of narcotic drugs", and who, upon re-entering the United States at the Port of San Diego, (San Ysidro), County of San Diego, failed to register with a Customs official, and also failed to surrender the certificate required by law in violation of Title 18, U.S.C., Section 1407 (C.T., p.3).

be a young male citizen pursuant to the provisions of Section 5010 (a) of Title 18, U.S.C., and placed on probation (C.T., p.18).

III.

CERTIFICATIONS BY COURTS

The District Court erred in failing to certify from the indictment the pretrial charges alleging that defendant-appellant was a "user" of narcotics.

2. The District Court erred in failing to dismiss the indictment.

3. The statute under which defendant-appellant was indicted, cited and sentenced, namely: Title 18, U.S.C., Section 1407, is unconstitutional in whole or in part when applied to appellant.

IV

STATEMENT OF FACTS

An indictment was filed on July 8, 1960, in the United States District Court, Northern District of California, Southern Division, charging appellant of being a citizen of the United States who was, on May 19, 1960, "addicted to and a user of narcotic drugs", and who, upon re-entering the United States at the Port of San Diego, (San Ysidro), Country of San Diego, failed to negotiate with a Customs official, and also failed to surrender the contraband required by law in violation of Title 18, U.S.C., Section 1407 (C.T., p.3).

Appellant was thereafter arraigned and subsequently filed a Motion to Dismiss Indictment and Motion to Strike portions of the indictment (C.T., p.4, 5), which motions were predicated on the ground that the phrase "and a user" was indefinite, and ambiguous, and that the indictment and the statute upon which it was founded was violative of the privilege against self-incrimination, of the Fifth Amendment to the Constitution, and the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution (C.T., p.4, 5). A hearing was had on said motions and following oral argument the motions were dismissed (A.C.T., p.2).

On August 16, 1966, jury trial was waived and the case was heard on stipulated facts and decided on the same day (R.T., p.4-6). The stipulated facts (C.T., p.14, 15) show that if HERBERT W. REAY, JR., was called as a witness and duly sworn, he would testify that on May 29, 1966, the defendant WILLIAM EDWARD ROSE, returned to and entered the United States from Mexico by entering at San Ysidro (San Diego) in San Diego County in the Southern Division of the Southern District of California, and made said entry without registering or surrendering the certificate as required by Title 18, U.S.C., Section 1407.

It was further stipulated and agreed that if PAUL R. SALERNO, M.D., were called to testify, he would state that on May 29, 1966, he observed three recently made needle

marks and five other needle marks upon said defendant's arms, and that it was his opinion that the said defendant was under the influence of narcotic drugs at the time of said examination.

Following the entering of the stipulated facts, appellant once again asserted the invalidity of the statute and the indictment under which defendant was being prosecuted, and asked for the court to dismiss the case. (R.T., p. 5, 6). Whereupon the judge stated:

> "...this is one of the most salutary statutes we have on the books today. It has saved more people from themselves and has led to the discovery of narcotics, narcotic traffic, and without it I think we would be very hard put to enforce the law relative to importation of narcotics, and I believe that it also serves a great purpose in preventing the continued use of narcotics by persons who are apprehended, and I have previously held that the Statute is not vague or uncertain and that it is constitutional and, therefore, on the stipulation I will find the defendant guilty."(.R.T., p.6).

Sentencing was thereupon held on September 8, 1966, and the defendant adjudged to be suitable for handling under the Federal Youth Correction Act, and pursuant to Title 18, U.S.C., Section 5010(a), defendants sentence was suspended and he was placed on probation for five years. (C.T., p.16).

V.

ARGUMENT

A. TITLE 18, U.S.C., SECTION 1407, IS UNCONSTITUTIONAL WHEN APPLIED TO APPELLANT IN THAT THE PHRASE "USER" IS NOT SUFFICIENTLY DEFINATE TO APPRISE

HIM OF THE PROHIBITED CONDUCT NOR TO SUPPLY A SUFFICIENTLY DEFINITE STANDARD TO MEASURE HIS GUILT OR INNOCENCE.

Appellant has resisted the constitutionality of the statute on the basis that it is vague and ambiguous from the very beginning, having prior to plea entered a Motion to Strike that portion of the indictment that charged him as a "user", and continued to assert this position up to and during trial.

The United States Supreme Court has, on numerous occasions, struck down both Federal and State statutes, for failure to meet an objective standard which would apprise the public of the conduct which is proscribed. In Bouie v. City of Columbia, 84 S.Ct. 1697 (1964), the court defined the standard of definiteness to be applied in testing penal statutes:

> "The basic principal that a criminal statute must give fair warning of the conduct it makes a crime has often been recognized by this court. As was said in United States v. Harries, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,
>
> > 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
>
> Thus we have struck down a state criminal statute under the Due Process Clause where it was not sufficiently explicit to inform those who are subject to it what conduct on their part will

render them liable to its penalties.' Connally v. General Construction Company Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.

We have recognized in such cases that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids'. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888."

The controlling case in determining the constitutionality of Title 18, U.S.C., Section 1407, United States v. Eramdjian, 155 F. Supp. 914, held that the term "addict" was sufficiently definite to constitute an objective standard. However, that case specifically left open the question of whether the phrase "user" was unconstitutionally vague.

Appellant submits that the phrase "user" is not sufficiently precise to allow one to predicate his behaviour upon its meaning. Use is in essence an act but the phrase "uses" applied in Title 18, U.S.C., Section 1407, indicates that some sort of consistent behaviour, short of addiction, is the basis of its classification. Thus the problem that confronts one is whether a single use requires registration, or whether the statute is aimed at those who have used narcotic drugs many times and who are

render them liable to its penalties.' Connally v. General Construction Company, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.

We have recognized in such cases that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law' Ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids'. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888."

The controlling case in determining the constitutionality of Title 18, U.S.C., Section 1407, United States v. Brandfon, 155 F. Supp. 816, held that the term "addict" was sufficiently definite to constitute an objective standard. However, that case specifically left open the question of whether the phrase "user" was unconstitutionally vague.

Appellant submits that the phrase "user" is not sufficiently precise to allow one to predicate his behavior upon its meaning. What is in essence is set out the phrase "uses" applied in Title 18, U.S.C., Section 1407 indicates that some sort of consistent behavior, short of addiction, is the basis of its classification. Thus the problem that confronts one is whether a single use requires registration, or whether the statute is aimed at those who have used narcotic drugs many times and who are

in danger of becoming addicted thereto. Therefore, the Court, the jury and the public at large are left to conjecture as to the precise meaning of the term and as to whether their present or contemplated conduct falls within the prohibitions contained in the statute.

It would further seem that the question of vagueness takes on added significance when the conduct proscribed directly infringes upon the exercise of personal freedoms which are protected by the Constitution of the United States. Thus, recognizing that the right to travel is a personal freedom guaranteed to all citizens through the Fifth Amendment, an attempt to curtail the exercise of this right must not only represent a valid and vital interest of national security, but it must also represent a clear and careful articulation of such legislative power.

B. REQUIRING APPELLANT ON ENTERING AND LEAVING THE UNITED STATES TO ADMIT, UNDER PENALTY OF THREATENED IMPRISONMENT, THAT HE IS A USER OF OR ADDICTED TO NARCOTICS CONTRAVENES THE RIGHTS GUARANTEED TO HIM BY THE CONSTITUTION.

The full range of liberties guaranteed under the Fifth Amendment have never been enumerated nor would it seem reasonable to do so. However, the concept of the right to travel has been recognized as an essential element of theFifth Amendment freedoms. In Kent v. Dulles, 357 U.S. 116 (1958), the court stated that:

--

in danger of becoming addicted thereto. Therefore, the Court, the jury and the public at large are left to conjecture as to the precise meaning of the term and as to whether their presence or contemplated conduct falls within the prohibitions contained in the statutes.

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B. REQUIRING APPELLANT ON ENTERING AND LEAVING THE UNITED STATES TO ADMIT, UNDER PENALTY OF IMPRISONMENT, THAT HE IS A MEMBER OF OR ADHERENT TO MARXISTIC DOCTRINES THAT ULTIMATELY CONDUCTED TO RUN OF THE CONSTITUTION.

The full range of liberties guaranteed under the Fifth Amendment have never been enumerated nor would it seem reasonable to do so. However, the concept of the right to travel has been recognized as an essential element of cherished constitutional freedoms. In Kent v. Dulles, 357 U.S. 116 (1958), the Court stated that:

> "The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment.... Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country maybe as close to the heart of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values."

It should be noted that a month after the decision in Kent v. Dulles, supra, President Eisenhower issued a message to Congress stating that:

> "Any limitation on the right to travel Can only be tolerated in terms of overriding requirements of our national security."
> Message from the President, House Document No. 417, 85th Congress, 2nd Session; 104 Congressional Record 13046.

Recognizing that the liberties guaranteed under the Fifth Amendment cannot be restricted without due process of law, the question remains what statutory standards are such that they avoid the claim of unreasonable and arbitrary use of power. In Aptheker v. Secretary of State, 378 U.S. 500 (1964), a case holding that a federal statute prohibiting the issuance of a passport to a member of the Communist Party was unconstitutional in that it unduly restricted the fundamental liberties of a citizen to travel, the court said about the statute therein that:

> "The section, judged by its plain import

"The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment....

Freedom of movement across frontiers in either direction and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be vital to the pursuit of the individual as the choice of what he eats or wears or reads. Freedom of movement is basic in our scheme of values."

It should be noted that a month after the decision in Zemel v. Rusk, supra, President Eisenhower issued a message to Congress stating that:

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Message from the President, House Document No. 417, 85th Congress, 2nd Session)

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"The matter, judged by its plain import

and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individuals knowledge, activity, committment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S., at 307, yet here as elsewhere, prescision must be the touchstone of legislation so affecting basic freedoms, N.A.A.C.P. v. Button, 371 U.S. at 438.

Assuming that there is a vital national policy to be accomplished through the control of narcotic traffic, it is clear that such interest can only be achieved through a statute that is precisely and narrowly drawn such that the freedoms guaranteed to each citizen through the Fifth Amendment are not infringed by the broad and far reaching consequences of an inarticulate statute. It is clear that Title 18, U.S.C., Section 1407, prohibits all travel outside the United States to any place for any reason, unless one, who is within its classification, has registered with a Customs official. Such registration bears no relationship to the activity or purposes contemplated by the prospective traveler during his journey and its only possible intent is to facilitate the surveillance and observation of those who might

> and by the substantive evil which Congress sought to control, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individuals knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil', cf. Cantwell v. Connecticut, 310 U.S., at 307, yet here as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms, N.A.A.C.P. v. Button, 371 U.S. at 438.

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possibly be involved in the illicit international traffic in drugs.

The trial judge indicated thatthis statute leads to the discovery of narcotics and narcotic traffic as well as providing a method whereby the Government helps narcotic users or addicts to help themselves (R.T., p.6). Accepting each justification for the statute on its own merits, it may readily be seen that none of the rationale is an acceptable nor a constitutional basis for the implementation of such a statute. Accepting the trial judge's statement that the statute is a tool in the rehabilitation of narcotic offenders, it must be noted that travel by the restricted class of persons is not completely eliminated, since travel is only invalid for those persons who fail to register with a Customs official. Following registration, one may travel as he pleases indulging in any type of conduct he pleases, and surely, if one is addicted to narcotics, the mere imposition of the requirement of registration is not going to cause him to forego such addiction. Therefore, the only meaning attributable to such a comment is that the imprisonment for failure to register as provided in the statute will initiate a withdrawl and complete recovery from the addiction to narcotics.

The statute is plainly penal in nature and rehabilitation of narcotic offenders through imprisonment is

possibly be involved in the illicit international traffic in drugs.

The trial judge indicated that this statute leads to the discovery of narcotics and narcotic traffic as well as providing a method whereby the Government helps narcotic users or addicts to help themselves (R.T., p.6). Accepting such justification for the statute on its own merits, it may readily be seen that much of the rationale is acceptable not a constitutional basis for the implementation of such a statute. Accepting the trial judge's statement that the statute is a tool in the rehabilitation of narcotic offenders, it must be noted that travel by the restricted class of persons is not completely eliminated, since travel is only invalid for those persons who fail to register with a Customs official. Following registration, one may travel as he pleases including in any type of conduct he pleases, and surely, if one is addicted to narcotics, the mere imposition of the requirement of registration is not going to cause him to forego such addiction. Therefore, the only meaning attributable to such a statute is that the imprisonment for failure to register as provided in the statute will initiate a withdrawal and complete recovery from the addiction to narcotics.

The statute is plainly penal in nature and rehabilitation of narcotic offenders through imprisonment is

patently violative of the Eighth Amendment of the Constitution prohibiting cruel and unusual punishment. This was recognized by the Supreme Court of the United States in Robinson v. California, 307 U.S. 660 (1962) where the court, in holding the penal provisions of Section 11721 of the California Health & Safety Code invalid, stated:

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for aperson to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement or sequestration, but in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a State law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behaviour there, inflicts cruel and unusual punishment in violation of the Fourteenth Amendment.

Clearly then any attempt to characterize the statute as rehabilitation-oriented would meet the mandate that

penal provisions for narcotics addiction or use are violative of the constitutional provision against cruel and unusual punishment.

However, if the statute is to be construed as attempting to prevent the importation of narcotics in order to protect the public at large from the evils accompanying said introduction, then the statute violates the provisions of the Fifth Amendment of the Constitution that provides that no person shall be required to incriminate himself. It appears that the purposes ascribed to the statute in this sense could be carried out only by utilizing the registration in such a manner that further observation and surveillance of the registrant is possible.

The case of United States v. Eramdjian, 155 F.Supp. 914, which held that the statute now in question was constitutional, discussed the problem of self-incrimination involved in registering pursuant to Title 18, U.S.C., Section 1407 and stated that:

> "The privilege against self-incrimination does not extend to matters which might tend to incriminate a witness under the laws of another jurisdiction. United States v. Murdock (1931), 284 U.S. 141, 149, 52 S.Ct. 63, 76 L.Ed. 210; Feldman v. United States, (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408.

This same reasoning was relied upon in other cases questioning the constitutionality of Title 18, U.S.C., Section 1407, namely Reyes v. United States, 258 Fed.2d 744

penal provisions for narcotics addiction or may are violative of the constitutional provision against cruel and unusual punishment.

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The case of United States v. [illegible], [illegible] F.Supp. 916, which held that the statute now in question was unconstitutional, discussed the problem of self-incrimination involved in registering pursuant to Title 18, U.S.C., Section 1407 and stated that:

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This same reasoning was relied upon in other cases questioning the constitutionality of Title 18, U.S.C., Section 1407, namely Reyes v. United States, 258 F.2d 774

(1958), and Palmas v. United States, 261 Fed 2d 93 (1958). It also should be noted that these same cases were relied upon by the United States Attorney General in opposing the appellant's Motion to Dismiss the Indictment (C.T., p. 13).

However, the case of Murphy v. Waterfront Commissioner of New York, 378 U.S. 52 (1964), held that the priviledge against self-incrimination protects a person against incriminating himself under the laws of a sovereign different from that compelling the incriminating statement. The court therein stated:

> "We reject-as unsupported by history or policy-the deviation from that construction only recently adopted by this Court in United States v. Murdock, supra, and Feldman v. United States, supra. We hold that the constitutional priviledge against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

Although the court in United States v. Eramdjian, 155 F. Supp. 914 (1957), interposed that no criminal case was pending and that no prosecution can be based upon registration alone, this patently begs the question in light of the decision handed down by this very court in Russell v. United States, 306 Fed 2d 402 (9th Cir., 1962). In striking down a portion of the Federal Firearms Act as being violative of the privilege against self-incrimination, the court stated:

"It has been held that the priviledge against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118. This being so, it cannot be doubted that the priviledge extends to information which, by operation of statute, prima facie establishes guilt. The fact that, under stated circumstances, the registrant may be able to convince the jury that his possession was not in violation of the Act, is immaterial. The priviledge may be claimed by one who is innocent but who reasonably could fear that disclosure of the information would result in criminal charges against which he would have to defend himself. See Blau v. United States, 340 U.S. 159, 161, 71 S.Ct. 223, 95 L.Ed. 170."

Similarly the United States Supreme Court held in Hoffman v. United States, 341 U.S. 479, 487, that:

"To sustain the priviledge, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

The court in United States v. Eramdjian, 155 F. Supp. 914 (1957), likened registration pursuant to Title 18, U.S.C., Section 1407, to the filing of income tax returns in that there was no threat of prosecution, nor a subpoena or a court order compelling registration, and that the only possible coercion was compliance with the law. However, Albertson and Proctor v. Subversive

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The court in United States v. Gaudlin, 153 F. Supp. 914 (1957), likened registration pursuant to Title 18, U.S.C., Section 1407, to the filing of income tax returns in that there was no threat of prosecution, nor a subpoena or a court order compelling registration, and thus the only possible coercion was compliance with the law. However, Albertson and Proctor v. Subversive

Activities Control Board, 382 U.S. 70 (1965), in striking down the requirement that individual members of the Communist Party must register, stated that:

> "...if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes."
>
> ...
>
> "...the question in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the forms questions in context might involve the petitioners in the admission of a crucial element of a crime."

This case went on to hold that the mere fact that the admission would provide the authorities with an investigatory lead and would not of itself be a confession or admission of criminal activity, it would be sufficent to strike the statute requiring such registration.

In view of the Murphy v. Waterfront Commissioner of New York, 378 U.S. 52 (1964), it would therefore appear that no statement made to either federal or state authorities may be used which would furnish an investigatory lead or an element or link in the chain of

Subversive Control Board, 367 U.S. 72 (1961), in
striking down the requirement that individual members of
the Communist Party must register, stated that:

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accomplished in real secrecy, we do
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...

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In view of the Marchetti v. United States,
390 U.S. 39 (1968), it would
therefore appear that an statement made to either federal
or state authorities may be used which would furnish an
investigatory lead or an element or link in the chain of

evidence needed to prosecute a party for either a federal or state crime, without granting the declarant complete immunity.

The mandate of the Fifth Amendment of the Constitution is clear- no man shall be compelled to be a witness against himself. The requirement of registration pursuant to Title 18, U.S.C., Section 1407, clearly violates this constitutional command. One need look no further than the federal law to observe that registration provides the authorities with either a crucial element of a crime, a link in the chain of evidence needed to prosecute, or an investigatory lead in pursuit of such prosecution.

There are various manifestations of disobedience to Title 18, U.S.C., Section 1407, comprised of the following:

1-Attempting to leave the United States without registering;

2-Leaving the United States without registering;

3-Attempting to enter the United States without registering;

4-Entering the United States without registering;

5-Attempting to Enter the United States without surrendering the registration certificate; and

6-Entering the United States without surrendering

evidence needed to prosecute a party for either a federal or state crime, without granting the defendant complete immunity.

The enactment of the Fifth Amendment of the Constitution is clear- no one shall be compelled in any criminal case against himself. The requirement of registration pursuant to Title 18, U.S.C., Section 1407, clearly violates this constitutional command. The need look no further than the federal law to measure that registration provides the authorities with either a crucial element of a crime, a link in the chain of evidence needed to prosecute, or an investigatory lead to pursuit of such prosecution.

There are various classifications of disclosures in Title 18, U.S.C., Section 1407, comprised of the following:

1-Attempting to leave the United States without registering;

2-Leaving the United States without registering;

3-Attempting to enter the United States without registering;

4-Entering the United States without registering;

5-Attempting to enter the United States without misrepresenting the registration requirements and

6-Entering the United States without misrepresenting

the registration certificate.

Thus, an admission and registration as an addict and a user of narcotics upon entering the United States would in turn entail an admission of attempting to and leaving the United States without registering subjecting one to the penalties imposed by the statute under discussion. Also, it must be noted that once a party has registered, past records could reveal that the party in question has failed to register on other occasions when he left the country.

Other Federal statutes also must be cited in that registration pursuant to Title 18, U.S.C., Section 1407, would provide the Federal authorities with vital evidence in prosecuting actions thereunder.

Title 21. U.S.C., Section 174 providing punishment for smuggling heroin across international borders, and Title 21, U.S.C., Section 178, providing for punishment for being in possession of opium while crossing international borders, are examples of statutes under which appellant may be convicted following registration at an international border. Numerous cases considered in this court have shown that government attorneys rely on use or addiction to show knowledge of the presence of contraband in a vehicle. It appears inescapable that the use of registration in this manner is a clear violation of the principle established by this court in Russell v. United States, 306 F.2d 402 (9th Cir., 1962).

the registration certificate.

Thus, an adequate and registration as an author and a user of narcotics upon entering the United States would in fact entail an adequate of attempting to and leaving the United States without registering anything over to the penalties imposed by the statute under discussion. Also, it must be noted that once a party has registered, past records would reveal that the party in question has failed to register on other occasions when he left the country.

Other Federal statutes also must be relied in that registration pursuant to Title 18, U.S.C., Section 1407, would provide the Federal authorities with vital evidence in prosecuting serious offenses.

Title 21, U.S.C., Section 174 providing punishment for smuggling heroin across international boundary, and Title 21, U.S.C., Section 176, providing for punishment for being in possession of opium while crossing international boundary, are examples of statutes under which appellant may be convicted following registration at an international border. Numerous cases considered in this court have shown that government accomplices rely on use or violation to show knowledge of the presence of contraband in a vehicle. It appears impossible that the use of registration in this instance is a clear violation of the principle established by this court in Tweedy v. United States, 366 F.2d 549 (9th Cir., 1966).

There are a number of California statutes which present danger to one who registers at the international border, the most obvious of which is Section 11721 of the California Health and Safety Code, which provides for punishment in the event that one is found to be using or under the influence, or addicted to, the use of narcotics. The prerequisite to compulsory registration at the border is that one be a user of or addicted to narcotic drugs; thus registration provides an admission of a crime under the California law and subjects the registrant to the highly probable circumstance of being prosecuted for obeying the command of the law of another jurisdiction. This is purely and simply a direct violation of the principle established in Murphy v. Waterfront Commissioner of New York Harbor, 378 U.S. 52 (1964).

Another state prosecution which might emanate from registration is a violation of Section 11500 of the California Health and Safety Code, which provides for imprisonment of up to 10 years in the state prison for possession of narcotics. Registration entails an admission of either use of or addiction to, narcotics and although the regist ation itself does not admit the possession of narcotics, it does supply the authorities with an investigatory lead which fact is in direct violation of the rules established in Albertson and Proctor v. Subversive Activities Control Board 382 U.S. 70 (1965).

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Section 23105 of the California Vehicle Code presents another danger to one who registers at the international border. This particular statute provides for prosecution for driving a vehicle while being addicted to narcotics. It seems highly possible that registration would provide the California authorities with a vital element in their investigatory procedures subjecting appellant to a risk which violates the principles adopted by the United States Supreme Court.

Perhaps the greatest danger confronting appellant had he registered was a proceeding under Section 3100, et seq. of the California Welfare and Institutions Code (formerly Sections 6500, et seq., of the California Penal Code). This Section provides that a person not charged with a crime may be involuntarily committed to a state facility for the treatment of narcotic addiction for a period up to 10 years. Since the incarceration is involuntary, it seems highly unrealistic to assert that a person could be so institutionalized without providing him with the full measure of his constitutional rights. Although the California Supreme Court has upheld the constitutionality of the statute providing for involuntary committment of persons not charged with a crime, that court has also recognized that there are numerous safeguards for one in such a proceeding, including compulsory arraignment, the right to have counsel appointed if the respondent be an

Section 23109 of the California Vehicle Code presents another danger to one who registers at the International border. This particular statute provides for prosecution for driving a vehicle while being addicted to narcotics. It seems highly possible that registration would provide the California authorities with a valid element in their inventory procedures subjecting applicant to a civil action violates the principles enjoyed by the United States Supreme Court.

Perhaps the greatest danger confronting applicant had he registered was a prosecution under Section 11500, et seq., of the California Uniform Narcotic Drug Act (formerly Sections 3390, et seq., of the California Penal Code). This section provides that a person not charged with a crime may be involuntarily committed to a state facility for the treatment of narcotic addiction for a period up to 10 years. Since the incarceration is involuntary, it seems highly unrealistic to assert that a person could be so institutionalized without providing him with the full measure of his constitutional rights. Although the California Supreme Court has upheld the constitutionality of the statutes providing for involuntary commitment of persons not charged with a crime, that court has recognized that there are numerous safeguards for use in such a proceeding, including compulsory examination, the right to have counsel appointed if the respondent be an

indigent and the right to be personally present at all stages of the proceedings. In People v. Victor, 42 Cal. Rptr. 199 (1965), the California Supreme Court, in discussing the rights of one faced with possible committment to a state institution, made the following pertinent observations:

> "...In an earlier stage of the Gross case (Gross v. Superior Court) (1954) 42 Cal.2d 816, 821 (5a-5b), 270 P.2d 1025), the petitioners sought mandate to compel preparation at the state's expense of transcripts of the proceeding in which he was adjudged a sexual psychopath. We granted the relief prayed for, reasoning as follows: "The proceeding is not strictly a criminal case... yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent. The one sought to be declared a sexual psychopath is entitled to bail pending determination. [Citations]. He is entitled tobe present at the hearing and if he has no counsel the court may appoint one for him or order the public defender to serve. [Citations]. His liberty is at stake. Since those things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of Section 69952 of the Government Code [providing for payment of transcript fees out of the county treasury]. See in Re Paiva, 31 Cal.2d 503, [190 P.2d 604]; People v. Smith, 34 Cal.2d 449 [211 P.2d 561]. Similar considerations obtain here and lead us to the same conclusion, i.e., that persons involuntarily committed to the custody of the Director of Corrections under this program have the right to a free transcript on an appeal from the order of committment."

Therefore, although the proceeding is neither wholly penal nor wholly civil, the courts have recognized that the proceeding is of such a nature that rights afforded to one

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under a criminal proceeding are equally applicable in a proceeding instigated for the purpose of having one involuntarily committed to a facility designated by the Department of Corrections of the State of California. It seems inescapable that the privilege against self-incrimination is equally applicable in the committment proceeding since the other rights which have been recognized would be of little consequence if the full complement of criminal safeguards were not guaranteed. A selective approach as to the rights to be granted one in appellant's situation would represent an arbitrary and unreasonable classification the effects of which dilute the rights which are granted by the very fact that similar rights are denied.

The correctness of this position was recognized by the United States Supreme Court as early as 1886 in Boyd v. United States, 116 U.S. 616 (1886), in which it was held that the Fourth and Fifth Amendment protections against unreasonable searches and seizures and against compulsory self-incrimination applied to civil forfeiture actions. The court therein stated:

> "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within

the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal.

...If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants-that is, civil in form- can be by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As shown in the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of Coffey v. United States, ante, 436; in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment

the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.

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to the Constitution, and is the equivalent of a search and seizure- and an unreasonable search and seizure- within the meaning of the Fourth Amendment". 116 U.S. 633-635.

This principle, as set forth by the Supreme Court in 1886, was reiterated as recently as 1965 in 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, holding that the constitutional exclusionary rule applies to state forfeiture proceedings.

Appellant submits that the foregoing authorities permit no other conclusion than that requiring the appellant to register pursuant to Title 18, U.S.C., Section 1407, clearly contravened his privilege against self-incrimination.

VI.

For the foregoing reasons, it is respectfully submitted that conviction of appellant should be reversed and the cause remanded with instructions to dismiss.

Respectfully submitted:

DONALD H. FREEMAN
Attorney for Appellant WILLIAM EDWARD ROSE

to the Constitution, and is the equivalent of a search and seizure— and an unreasonable search and seizure— within the meaning of the Fourth Amendment". 116 U.S. 634-635.

This principle, as set forth by the Supreme Court in 1886, was reiterated as recently as 1965 in 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, holding that the constitutional exclusionary rule applies to state forfeiture proceedings.

Appellant submits that the foregoing authorities permit no other conclusion than that requiring the appellant to register pursuant to Title 26, U.S.C., Section 5841, clearly contravened his privilege against self-incrimination.

VII

For the foregoing reasons, it is respectfully submitted that conviction of appellant should be reversed and the cause remanded with instructions to dismiss.

Respectfully submitted,

[illegible]
Attorney for Appellant WILLIAM EDWARD [illegible]

CERTIFICATE

I, DONALD H. FREEMAN, certify, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those Rules.

DONALD H. FREEMAN
Attorney for Appellant
WILLIAM EDWARD ROSE

CERTIFICATE

I, DONALD H. FREEMAN, certify, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those Rules.

DONALD H. FREEMAN
Attorney for Appellant
WILLIAM EDWARD HAWK

Title 18, U.S.C. Section 1407: Border crossing-narcotic addicts and violators

"(a) In order further to give effect to the obligations of the United States pursuant to the Hague convention of 1912, proclaimed as a treaty on March 3, 1915 (38 Stat. 1912), and the limitation convention of 1931, proclaimed as a treaty on July 10, 1933 (48 Stat. 1571), and in order to facilitate more effective control of the international traffic in narcotic drugs, and to prevent the spread of drug addiction, no citizen of the United States who is addicted to or uses narcotic drugs, as defined in section 4731 of the Internal Revenue Code of 1954, as amended (except a person using such narcotic drugs as a result of sickness or accident or injury and to whom such narcotic drug is being furnished, prescribed, or administered in good faith by a duly licensed physician in attendance upon such person, in the course of his professional practice) or who has been convicted of a violation of any of the narcotic or marihuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers, under such rules and regulations as may be prescribed by the Secretary of the Treasury with a customs official, agent, or employee at a point of entry or a border customs station. Unless otherwise prohibited by law or Federal regulation such customs official, agent or employee shall issue a certificate to any such person department from the United States; and such person shall, upon returning to the United States, surrender such certificate to the customs official, agent, or employee present at the port of entry or border customs station.

(b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one nore more than three years, or both. Added July 18, 1956, c.629, Title II, § 201, 70 Stat. 574".

Title 18, U.S.C. Section 1407: Border crossing-narcotic addicts and violators

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(b) Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one nor more than three years, or both. Added July 18, 1956, c.629, Title II, § 201, 70 Stat. 574".

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss.

LOIS FREEMAN after being first duly sworn, deposes and says:

That I am a citizen of the United States, over 18 years of age, a resident of the County of San Diego, and not a party to the within action. My business address is 345 East Eighth Street, National City, California, 92050.

I served the attached Appellant's Opening Brief by placing a true copy thereof in an envelope addressed to:

PHILLIP W. JOHNSON
Assistant United States Attorney
U.S. Courthouse Building
325 West "F" Street
San Diego, California

which envelope was then sealed and postage fully prepaid thereon and thereafter was on December 27, 1966, deposited in the United States mail at National City, California; there is delivery service by the United States Mail at theplace so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Lois Freeman
LOIS FREEMAN
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27th DAY OF DECEMBER, 1966

SYLVIA I. BOWMAN SMITH
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY

Sylvia I. Bowman Smith
NOTARY PUBLIC in and for said
County and State

SYLVIA I. BOWMAN SMITH NOTARY PUBLIC
My commission expires Aug. 22, 1967

AFFIDAVIT OF LOSS OF MAIL

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO } ss.

LOIS FREEMAN, after being first duly sworn, deposes and says:

That I am a citizen of the United States, over the age of 21 years, a resident of the County of San Diego, and not a party to the within action. My business address is 845 Cass Street, Mountain City, California, 92010.

I served the attached Appellant's Opening Brief by placing a true copy thereof in an envelope addressed to:

PHILIP V. JESSUP
Assistant United States Attorney
U.S. Courthouse Building
338 Upper "F" Street
San Diego, California

which envelope was then sealed and postage fully prepaid thereon and deposited in the United States mail at Mountain City, California; there is delivery service by the United States Mail at that place, or regular communication by United States mail between the place of mailing and the place so addressed.

LOIS FREEMAN
Affiant

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 2ND DAY
OF DECEMBER, 1960.

SYLVIA I. BOWMAN SMITH
NOTARY PUBLIC IN AND FOR SAID
County and State

SYLVIA I. BOWMAN SMITH, NOTARY PUBLIC
My Commission expires May 22, 1961